IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 10398

UNITED STATES OF AMERICA,
Appellant,

vs.

GORDON T. CAREY, et al,
Appellees.

BRIEF OF APPELLEES

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INDEX

CITATIONS

Cases

STATUTES

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STATEMENT OF THE CASE

On June 14th, 1935, the United States filed, in the District Court, a petition to condemn 3,474.34 acres of land in Harney County, Oregon, and also, at the same time, filed in said court a Declaration of Taking made March 27th, 1935, by M. L. Wilson, Acting Secretary of Agriculture of the United States. (R. 20-22.) On the same date, June 14th, 1935, the District Court made and entered a judgment on the Declaration of Taking. (R. 22-26.)

On December 4th, 1940, William J. George, et al, filed a motion in said court, asking that the judgment on Declaration of Taking be annulled and vacated,

and that the petition of plaintiff be dismissed. (R. 76-77.)

On September 22nd, 1942, the District Court made an order vacating the judgment on Declaration of Taking, and dismissed the petition.

The lands involved are a part of the lake bed of Malheur Lake, and it may be helpful to here make a brief statement as to the history of such lands, as shown by the record of this case and by the decisions of the Federal Courts.

This Court has judicial notice of facts stated in the opinion of this court in *United States vs. Otley, et al,* 127 F. (2d) 988, and also of the facts related in the case of *United States vs. Oregon,* 295 U.S. 1. A summary of the history of Malheur Lake, as shown by the cases above mentioned, and by the records of this case, is as follows:

Prior to the year 1930, the title to the lands in the lake bed of Malheur Lake was in dispute. The State of Oregon claimed title to such lake bed because, as it claimed, Malheur Lake was a navigable lake when Oregon was admitted into the Union, and that the State, on admission, acquired title to the beds of all navigable lakes.

The United States claimed that the lake is not and never had been a navigable lake, and that the State of Oregon never at any time had title to the lake bed.

Certain individuals, including the appellees herein, claimed title to portions of the lake bed, by reason of being land owners abutting on the meander line of a non-navigable lake.

As shown by *United States vs. Oregon,* 295 U.S. 1, the United States in 1930, begun a proceeding in the Supreme Court of the United States to determine whether or not Malheur Lake was a navigable lake at the time Oregon was admitted into the Union. The Supreme Court, in 1935, decided that Malheur Lake is a non-navigable lake, and thereby disposed of Oregon's claim to title.

During the year 1934, and the early part of 1935 (while the ownership of the lake bed was in dispute), representatives of the Secretary of Agriculture interviewed all persons who owned lands bordering on the meander line of Malheur Lake, and attempted to acquire, by purchase, the patented lands of the land-owner bordering on the meander line of the lake. We think the record shows that at this time, the only lands sought were the patented lands bordering on the meander line. (R. 3-5; 9-15.) The lake bed at this time was still being claimed by the State, the Government, and by certain abutting land-owners.

On June 14th, 1935, the United States filed in the District Court, the Petition to condemn, the Declaration of Taking, and the Judgment on Declaration of Taking, involved in this appeal. Each of these, after

describing the lands sought by condemnation, contained the following clause:

> "And together therewith all right, title, claim and interest of the owner of said tracts to lands lying within the Neal survey lines purporting to surround Malheur and Mud Lakes and the Narrows."

In September, 1935, the appellees herein filed in said cause a motion asking that the United States set forth and particularize what area within the Neal survey line the petitioner sought to acquire by such condemnation proceedings. In January, 1937, the District Court, at the request of the petitioner, made an order directing a severance of the appellees herein from the original petition to condemn, and permitting the plaintiff to file an amended petition as to said appellees, and on said date, the amended petition was filed in said cause. (R. 46.)

Paragraph 8 of said amended petition is as folows:

> "The property sought to be acquired does not include any rights which the defendants may have or claim as appurtenant to said lands because riparian thereto, and it does not include any rights, title, interest or estate of the defendants in the lands or waters inside the Neal survey lines, claimed by defendants to be meander line of 'Malheur Lake,' as shown by and in accordance with the official plat of said Township 26 South, Range 32 E. W.M. (N.M.L.), as approved by the General Land Office and on file with the Surveyor General; and it also does not include any lands claimed to be relicted lands within the Malheur Lake Division, as described by the

United States Supreme Court decree dated June 5th, 1935, in re *United States vs. Oregon,* recorded in Book 36, p. 546, Harney Co. Or. records."

No attempt was ever made by the Court or the Government to change or modify the Declaration of Taking, or the Judgment on Declaration of Taking, of June 14th, 1935, in each of which the statement still remains that the United States has taken the lands therein described (including appellees lands), "and together therewith all the right, title, claim and interest of the owners of said tracts (including the appellees herein), to lands lying within the Neal survey line, etc."

No Declaration of Taking was filed as to lands owned by the parties included in the Amended Petition, and as to them, there is no Declaration of Taking unless the original is still in force.

On December 4th, 1940, the appellees herein filed a motion to vacate the Judgment on Declaration of Taking, and for a dismissal of the Petition.

On September 28th, 1942, the District Court made the Order now under consideration on this appeal.

ARGUMENT

The order and judgment of the court made Sep-

tember 22nd, 1942, should be sustained for the following reasons:

1. There is no authority given by Congress for instituting such a proceeding;

2. The complaint or petition does not state sufficient facts to constitute a cause of action;

3. The district court may of its own motion, dismiss, for lack of prosecution, after a cause has been pending for a period of more than seven years.

First—as to authority, or lack of authority, to bring the condemnation proceeding:

Paragraph 1 of the petition, says:

> "This petition is filed under the authority and provisions of the Act for the Relief of unemployment Through the Performance of Useful Public Works approved March 31, 1933 (48 Stat. 22), and pursuant to Executive Order No. 6724, dated May 28, 1934, authorizing the purchase or rental of land for emergency conservation work." (R. 2.)

The act of March 31, 1933, does not provide for the purchase or condemnation of private lands for a bird refuge. The said Act specifically prohibits the acquisition of private lands for such purposes. We quote from said Act as follows:

> "The President is authorized to provide for the employment of citizens of the United States, not otherwise employed, in the construction and

> maintenance and carrying on of work of a public nature in connection with the *forestation of lands belonging to the United States, or to the several states which are suitable for timber production,* the prevention of forest fires, flood and soil erosion, plant pest and disease control, the construction maintenance or repair of paths, trails and fire-lanes in the national parks and national forests, and such other work *on the public domain, national and state,* and Government reservations incidental and necessary in connection with any project of the character enumerated, as the President may determine to be desirable."

It should be here noted that the President is limited by the Act, to fire control projects and reforestation projects *on public lands of the nation or state.*

The Act then continues as follows:

> "Provided: That the President may in his discretion extend the provisions of the Act to lands owned by counties or municipalities, and to lands of private ownership, *but only for the purpose of doing thereon such kinds of cooperative work* as are now provided for by the Acts of Congress in preventing and controlling forest fires and the attacks of forest tree pests and diseases, and such work as is necessary in the public interest to control floods."

From the foregoing, it should be clear that the Act of March 31st, 1933, definitely limited the authority of the President, and prohibited the acquisition of private lands, except for the purposes set forth and designated in the Act.

Appellees contend that the Act of Congress of

March 31, 1933 (48 Stat. 22), grants no power or authority to condemn private lands for a Migratory Waterfowl Refuge.

We assume it is conceded that the Government cannot take private property by condemnation proceedings, unless authorized to do so by some Act of Congress. The petition recites that this proceeding is brought by virtue of the authority given by Act of Congress of March 31, 1933. That Act, a part of which is set out in appendix to appellants' brief, specifically prohibits the acquisition of private lands for the purposes set forth in the petition.

The Act of March 31, 1933, as set out in appellants' brief limits the President's unemployment operations to lands of *the United States or of the several states.*

Appellant quotes from paragraph 2 of the Act for the purpose of showing authority from Congress to acquire by condemnation proceedings. Said section two gives authority to condemn the class of property designated in section one of the Act, *"to carry on such public works."*

We contend that Congress has not authorized the Secretary of Agriculture, or the plaintiff, to acquire by condemnation, privately owned lands for the purposes set forth in the petition herein.

If there is no authority given by Congress to acquire the lands, then the Declaration of Taking is of

no force, and the District Court is without jurisdiction.

Our second objection is: The complaint or petition does not state sufficient facts to constitute a cause of action.

Section 258 of Title 40, U.S.C.A. is as follows:

> "The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of Section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceeding existing at the time in like causes, in the courts of record in the state within which such district court is held, any rule of the court to the contrary notwithstanding."

The petition in its paragraph 2, states that it is proceeding under Sections 257-258, U.S.C.A.

The petition in this case does not conform to the practice, pleadings or proceeding as prescribed by the laws of Oregon, as hereinafter pointed out:

Section 37-401 Oregon Laws, requires that in condemnation cases, the action shall be brought against the owner, or the person in possession of the lands. The statute makes the action a personal action.

Section 37-402 Oregon Laws, provides as follows:

> "Such action shall be commenced and proceeded with to final determination in the same manner as an action-at-law."

Section 1-704 of the Oregon Statutes, requires that every complaint shall contain three parts, as follows:

(1) The title of the cause, specifying the name of the court, and the name of the parties to the action, plaintiff and defendant;

(2) A plain and concise statement of the facts constituting the cause of action;

(3) A demand for the relief claimed.

In its petition for condemnation, the Government proceeds against 3474.34 acres of privately owned lands. The title of the cause is stated as follows:

"IN THE DISTRICT COURT
OF THE UNITED STATES,
FOR THE DISTRICT OF OREGON
No. 12492
UNITED STATES OF AMERICA,
Petitioner,
vs.
3474.34 ACRES MORE OR LESS, OF LAND IN HARNEY COUNTY, OREGON; HARNEY COUNTY, et al,
Defendants.
PETITION FOR CONDEMNATION" (R-2)

The Petition is not against the owner or the person in possession, and does not designate the parties defendant as required by the Oregon laws. The proceeding is against a tract of land, and not against the owners of the land. Neither in the title, nor in the body

of the petition is any party designated as the owner of any land.

The Oregon law also requires that every complaint shall contain a plain and concise statement of the facts constituting the cause of action.

The only attempted statement of facts constituting a cause of action is found in paragraph two of the petition which is as follows:

> "The Secretary of Agriculture has selected for acquisition by the United States, the lands hereinafter described for use in the construction of useful public works and improvement in connection with the Malheur Lake Migratory Waterfowl Refuge, and for such other uses as may be authorized by Congress, or by Executive Order. The said lands are necessary and are required for immediate use, in order that said construction work may be begun. In the opinion of the Secretary of Agriculture, it is necessary, advantageous and in the interest of the United States that said lands be acquired by judicial proceedings as authorized by Act of Congress approved August 1, 1888. (25 Stat. 357; 40 U.S.C.A. 257-258.)"

Then follows paragraph 3, the first five lines of which is as follows:

> "The lands sought to be acquired in this proceeding are described as follows:
> 'Malheur Lake Reservation Extension Tracts, 3474.34 acres, more or less, in Harney County, Oregon.'" (R. 3.)

Appellees contend that the foregoing statement

does not state a cause of action against these appellees. Attention is called to the fact that the appellees, Edna George, Anna Carey, Harry Carey, E. O. Shoemaker, Eliza A. Shoemaker and Betty George, were never mentioned in the Petition or Declaration of Taking, or otherwise. Said appellees above mentioned were brought in by the Amended Petition filed January 27, 1937. (R. 48-52.) These appellees could not be deprived of their lands until there was a proceeding pending against them. Section 258a, T. 40, U.S. C.A., provides that such Declaration of Taking may be filed only *after a proceeding is pending.* It is our contention that no valid proceeding was pending against any of the appellees at the time the Declaration of Taking was filed, in June, 1935. The appellant admits that no proceeding was pending as to some of the appellees until January, 1937, more than a year and a half after their lands were condemned.

Oregon laws further provide that every complaint shall contain a demand for the relief claimed. The relief claimed in the petition in this case is stated in paragraph 8 of the petition (R. 18-19), where it is asked that the Court "appoint commissioners to appraise and fix the value of the lands and the amount of compensation, * * * and make just distribution of the estimated and final award among those entitled thereto as expeditiously as possible."

Under the Oregon practice, a land-owner in a condemnation case has the right of trial by a jury, and is

entitled to present evidence in court as to the reasonable and fair value of his lands. "Such action shall be commenced and proceeded with to final determination in the same manner as an action-at-law." *Section 37-402, Oregon Laws.*

There is no way, under the petition herein, for trial and determination of the fair value of the lands of these appellees. They have been deprived of their lands, and have received no compensation therefor.

If the court should hold that a jury trial can be had in the present proceeding, then a serious question would arise as to the issue to be tried under the pleadings. The record shows that in June, 1935, a Declaration of Taking and a Judgment on Declaration of Taking was filed in which the 3474.34 acres of land mentioned in the petition, "and together therewith all rights, title, claim and interest of the owners of said tracts to land lying within the Neal survey lines, etc." was adjudged condemned, and the title vested in the United States. That Declaration of Taking and Judgment still stands of record, and appellees' lands within the Neal meander line is included therein. Of course, appellees at any trial would seek compensation for such lands. The plaintiff at such trial would contend that the amended petition filed January, 1937 (R. 48.), definitely stated in paragraph 8 thereof (R. 52-53) that the Declaration of Taking of June, 1935, did not include any lands within the Neal meander line, and that the landowner should not be

compensated for the lake bed lands not included in the amended petition.

The amended petition could not change or amend the Declaration of Taking of June, 1935. If that Declaration of Taking included lands in the lake bed, only Congress could release or dispose of such lands after they became vested in the United States by the Declaration of Taking of June, 1935. Therefore, at any trial the question as to whether lake bed lands were included in the Declaration of Taking must be determined, and it should now be determined by this court, whether the Declaration of June, 1935, included lake bed lands.

The District Judge may have had this difficulty in mind as well as the right of trial by jury, and other questions involved herein, when he announced in open court, during a discussion as to whether the case should be set down for trial: *"Well, you know what is going to happen. The Government is not going to be here. At least, I know that."* (R. 91.)

Following this remark, the court on his own motion, as well as on motion of appellees, dismissed the whole badly involved proceeding.

In the statement of the court above quoted, the District Judge expressed the belief that the court and the attorneys then knew that the Government would not try the case at any time, and therefore thought

the case should be dismissed, and then made his order to that effect.

The Court Was Authorized by Rule 41(b), Rules of Civil Procedure, to Enter the Order Here in Question

As we have endeavored to show, the District Court was fully conscious, at the time the Order was entered, that this abortive proceeding had been pending for more than seven (7) years. It is implicit in the remarks of the Court quoted above, that the long series of cumulative delays on the part of United States has made it most apparent that the Government would not respond to the Court's Order upon the setting of a trial date, if one should be made. The Court obviously took judicial notice of the long delays in this and other phases of the Malheur Lake litigation which has now been pending in the District Court for upwards of nine years, and which is still pending.

It is urged that the Government appeared at the first call date after rendition of the Otley decision and stated that it "would have to be ready for trial if the case should be scheduled for hearing." (App. Br. p. 17.) The remark carries its own construction that the Government would reluctantly and under compulsion appear for trial, if the Court should insist upon it. The spirit of Rule 41(b), supra, would appear not to place the onus upon the Court to see to it, as a matter of affirmative action, that litigation be pressed to expeditious conclusion. A concise expression of

the Rule applicable here would appear to be that of the Tenth Circuit in *Sweeney v. Anderson,* 129 F. (2d) 756, at page 758, which is as follows:

> "The elimination of delay in the trial of cases and the prompt dispatch of court business are prerequisites to the proper administration of justice. These goals cannot be attained without the exercise by the courts of diligent supervision over their own dockets. Courts should discourage delay and insist upon prompt disposition of litigation. Every court has the inherent power, in the exercise of a sound judicial discretion, to dismiss a cause for want of prosecution. *The duty rests upon the plaintiff* to use diligence and to expidite his case to a final determination. The decision of a trial court in dismissing a cause for lack of prosecution will not be disturbed on appeal unless it is made to appear that there has been a gross abuse of discretion."

Cited in support of the above Rule is the case of *Hicks v. Bekins Moving & Storage Company, Ninth Circuit,* 115 F. (2d) 406, among others.

The foregoing case of Hicks vs. Bekins Moving & Storage Company, of this Court, would appear from our research to be the leading case in definition of the circumstances under which the District Court is authorized to dismiss a cause for lack of prosecution. We request that the Court read this decision, in the light of the facts proferred by this record.

On the Contention of Estoppel

It is urged that these appellees are estopped to object to the validity of the Statute, based upon their

application, at one stage of the proceedings, for leave to withdraw certain moneys which had theretofore been deposited with the Clerk of the Court.

In response to this contention, we inquire, what Statute? We are not here confronted with an issue arising upon the validity of a Statute. It is true, too, as all parties admit, that the appellees have been deprived the use of their lands for seven years, and that the Government has enjoyed the use of such lands for that period without any compensation to the owners whatsoever. We find no basis in this circumstance for the contention that appellees have accepted benefits, nor are we able to apply the rule of *Great Falls Manufacturing Company vs. Attorney-General,* 124 U.S. 581, 598-600, cited at page 18 of appellant's brief, to the factual background presented by this record. To do so, we would be obliged to apply the quip of the Eastern Oregon wag who mused: "If we had some ham, we'd have ham and eggs, if we had the eggs."

Certainly the mere filing of an application for release of funds, an application which was denied, would not operate to set aside the Statutes of the United States, the Statutes of the State of Oregon, and the Rules of the Federal Courts.

It is respectfully submitted that the Judgment and

Order of the District Court should be sustained, for the reasons stated herein.

Respectfully submitted,

J. W. McCULLOCH,
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